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No. 89-1564

In The

Supreme Court of the United States

October Term, 1989

JAMES E. POOLE, JR., ET AL.,

Appellants,

v.

EMMA GRESHAM, ET AL.,

Appellees.

On Appeal From
A Three-Judge Panel Of The
United States District Court
Northern District Of Georgia

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

ARGUMENT 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

CASES CITED:

Allen v. State Board of Elections, 393 U.S. 544 (1969) 6

Dougherty County Board of Education v. White, 439 U.S. 32 (1978) 6, 7

Georgia v. United States, 411 U.S. 526 (1973) 6

Hathorn v. Lovorn, 457 U.S. 255, 265 (n.16) (1982) 7

NAACP v. Hampton County Election Commission, 470 U.S. 166, 178 (1985) 7

Perkins v. Matthews, 400 U.S. 379 (1971) 6, 7

United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978) 6, 7

STATUTES CITED:

42 U.S.C. § 1973c 3, 5, 6

O.C.G.A. § 36-30-13 2

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The State Defendants-Appellees, Joe Frank Harris, Michael J. Bowers, Russell N. Sewell, Max Cleland, and State Election Board, and the local Defendants-Appellees, Burke County Board of Registrars, Weston Fortson, W. E. Bessent, John M. Moseley, Burke County Board of Elections, Ralph B. Willis, Michael M. Searles, and Morris Green, move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the three-judge panel of the United States District Court for the Northern District of Georgia on the ground that it is manifest that

the question presented by this appeal is so unsubstantial as to not need further argument.

I.
STATEMENT OF THE CASE

The Town of Keysville, located in Burke County, Georgia, was incorporated in 1890 with corporate limits extending one-half mile in every direction from the schoolhouse located there. Ga. Laws 1890-91, Vol. II, p. 657. The schoolhouse upon which the boundaries were established was destroyed in approximately 1895, and apparently no one knows where it was located.

The charter for the Town of Keysville requires that a mayor and five council members be elected for one-year terms on the first Monday in January of each year. At some point during the 1930's, the Town of Keysville ceased to elect persons to fill these municipal offices. The government of the Town of Keysville remained inactive for many years despite the fact that Keysville continues to be a current municipality in the State of Georgia.

By 1985, numerous black residents of the Town of Keysville had begun efforts to reactivate the municipality. Because the laws of the State of Georgia did not contemplate a situation such as the one existing in the Town of Keysville, in which the town simply ceased performing governmental functions, the residents of the Town of Keysville experienced difficulty in reactivating the municipal government. In 1987, the Georgia General Assembly enacted a law, Ga. Laws 1987, p. 178, codified as O.C.G.A. § 36-30-13, which provided that, in the event

that all seats on the governing authority of a municipality are vacant, the election superintendent of the county shall have the authority to call for a special election to fill the vacant offices and to conduct, or to appoint someone to conduct, the election to fill the vacancies, and that the board of registrars of the county must prepare the electors list for the election. In interpreting this law, the Attorney General of Georgia instructed the Georgia Secretary of State that the duty to call for the election to fill the vacancies was mandatory on the county election superintendent.

Based upon this law and this advice, the Election Superintendent of Burke County called for an election to be held on January 4, 1988, to fill the vacancies existing on the governing authority of the Town of Keysville. The Board of Registrars of Burke County prepared an electors list for use in the election. The call and a map depicting the municipal boundaries, as determined by the Burke County Tax Assessor, were submitted to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c) for preclearance. The Attorney General reviewed the submission and precleared the election to be conducted in conformity with the submitted material, including the map depicting the municipal boundaries of the Town of Keysville, on December 9, 1987.

On December 3, 1987, certain citizens of the Town of Keysville, who are the Appellants herein, sought an injunction from the Superior Court of Burke County to enjoin the county election board and board of registrars from conducting the January 4, 1988, election. By order

entered on December 31, 1987, the superior court enjoined the county defendants "from undertaking any actions with regard to the scheduling or conducting of municipal elections until such time as the municipal boundaries for the Town of Keysville have been properly delineated in accordance with the requirements of law." (Exhibit 4 of Appendix to Jurisdictional Statement).

On December 31, 1987, the Plaintiffs-Appellees, in response to the order of the Superior Court of Burke County, sought a temporary restraining order from the United States District Court for the Northern District of Georgia to enjoin the enforcement of the superior court's order until that order was precleared in accordance with Section 5. The District Court granted the request for a temporary restraining order and permitted the election to be conducted on January 4, 1988.

A hearing was subsequently conducted before a three-judge panel of the District Court on the same issue and a preliminary injunction was issued continuing to enjoin the implementation of the superior court order until and unless the order was precleared. Upon agreement of the parties, the three-judge panel considered the issue of a permanent injunction based upon the record presented at the hearing on the preliminary injunction, and on June 30, 1988, the three-judge panel issued its opinion (Appendix, Exhibit 3) making the preliminary injunction permanent.

Upon appeal of the District Court's permanent injunction, this Court remanded the cause to the District Court to consider the question of mootness. After briefing and a further hearing on this issue, the District Court

concluded that the superior court's order could still be in effect, and, consequently, this cause was not moot. (Appendix, Exhibit 1). From this decision of the District Court, reinstating its June 30, 1988 order, the Appellants again bring an appeal to this Court. (Appendix, Exhibit 5).

II.

ARGUMENT

The question presented by the Appellants in this case is whether a state court order which, in enforcing previously precleared state election law, enjoins or delays a pending election until such time as state election law is complied with, is subject to preclearance under Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c) before such order may be enforced. However, this is not the issue the District Court decided.

> The only question before this court is whether the superior court order effects a change in voting requirements that must be precleared under section 5 before being enforced. (Appendix, Exhibit 3, at A-12).

The District Court held that the order of the Superior Court of Burke County, if given effect, would result in a change of a previously precleared practice and procedure in two ways. First, the superior court's order would result in a change of the date of the election; second, the superior court's order would set aside the municipal boundaries of the Town of Keysville. Both the date of the election and the municipal boundaries had been precleared by the Attorney General of the United States under Section 5. (Appendix, Exhibit 3, at A-12 to A-15).

On remand, the District Court concluded that the continuing possibility that the superior court's order could cause a change in the municipal boundaries keeps this controversy alive. (Appendix, Exhibit 1).

The provisions of Section 5 prevent the State of Georgia and its political subdivisions from enacting or seeking "to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," until and unless such qualification, prerequisite, standard, practice, or procedure has first been precleared either by a declaratory judgment of the District Court for the District of Columbia or by submitting the proposed change to the Attorney General of the United States. 42 U.S.C. § 1973c.

Section 5 has been interpreted broadly to apply to all changes in laws, practices, and procedures different from those in effect on November 1, 1964, regardless of how minor the change is. In *Allen v. State Board of Elections*, 393 U.S. 544, 563-69 (1969), this Court held that the phrase "standard, practice, or procedure" must be given the broadest possible scope. Subsequent cases have continued to underscore the broad scope of Section 5. *See, e.g., Perkins v. Matthews*, 400 U.S. 379 (1971) (Change in location of polling places, change in municipal boundaries, and change from ward to at-large elections); *Georgia v. United States*, 411 U.S. 526 (1973) (Reapportionment changes); *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978) (Change in form of municipal government); *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978) (County school board regulation).

The reach of Section 5 has also been given broad interpretation. This Court has not limited the application of Section 5 merely to states and their political subdivisions. This Court has held that Section 5 applies to all entities having power over any aspect of the electoral process within a jurisdiction subject to the preclearance requirements of Section 5. *See, e.g., United States v. Board of Commissioners of Sheffield, Alabama, supra; Dougherty Board of Education v. White, supra.* In 1982, this Court included orders of a state court within the reach of Section 5. *Hathorn v. Lovorn*, 457 U.S. 255, 265 (n.16) (1982) (" . . . a state court decree directing compliance with a state election statute contemplates 'administ[ration]' of the state statute within the meaning of Section 5.")

Clearly, Section 5 applies to this case. This Court in *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178 (1985), found that the rescheduling of the date of an election, even if not permanent, is a change under Section 5. "The Voting Rights Act reaches changes that affect even a single election." This Court has also held that a change in municipal boundaries, because it affects who may register to vote, is a change under Section 5. *Perkins v. Matthews*, 400 U.S. 379, 388-94 (1971).

CONCLUSION

This case presents no novel arguments concerning either the application or the reach of Section 5. The existing precedents of this Court answer every argument presented by the Appellants. Consequently, there are no substantial arguments for review by this Court and the

decision of the three-judge panel should be affirmed or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

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